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No. 94-1720

In the Supreme Court of the United States

OCTOBER TERM, 1994

NELSON GANDARILLAS-ZAMBRANA, A/K/A OSCAR JR. GANDARILLAS, A/K/A NALSON GANDARILLOS, PETITIONER

v.

BOARD OF IMMIGRATION APPEALS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of any showing of prejudice, petitioner's due process rights were violated because his deportation hearing was held at the venue closest to the detention center at which he was detained.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 44 F.3d 1251. The opinion of the Board of Immigration Appeals (Pet. App. 16a) and the opinion of the immigration judge (Pet. App. 17a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1995. The petition for a writ of certiorari was filed on April 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen of Bolivia who entered the United States as an immigrant in 1981. Pet. App. 2a, 17a. While living in the United States, petitioner committed a series of misdemeanor crimes, many of them in violation of conditions of probation. *Id.* at 3a-4a. The Immigration and Nationality Act, 8 U.S.C. 1251(a)(2)(A)(ii), provides for the deportation of "[a]ny alien who at any time after entry is convicted of two or more crimes involving moral turpitude." Pursuant to the Act, the Immigration and Naturalization Service (INS) in 1993 placed petitioner in deportation proceedings based on two Virginia larceny convictions. Pet. App. 2a; see *id.* at 22a-25a (Order to Show Cause). The INS initially detained petitioner in the temporary INS detention center in Arlington, Virginia. *Id.* at 7a. When he failed to post bond, however, the INS transferred him to the permanent INS detention center in Oakdale, Louisiana. *Ibid.* Petitioner's mother and three of his siblings live in Virginia. *Id.* at 18a.

The INS convened a deportation hearing at Oakdale on June 21, 1993. Pet. App. 2a, 18a. At the hearing, petitioner was advised of his right to counsel, given a list of free and inexpensive legal services providers, and granted a continuance in order to afford him time to seek representation. *Id.* at 8a. When the hearing resumed, petitioner appeared without counsel. He was again offered a continuance in order to obtain counsel, but elected to proceed pro se. *Ibid.*

Based on petitioner's acknowledgement of his two larceny convictions, the immigration judge (IJ) found petitioner deportable. Pet. App. 18a. The IJ denied petitioner's request for a waiver of inadmissibility

under 8 U.S.C. 1182(c). Pet. App. 5a, 18a-21a. On January 6, 1994, the Board of Immigration Appeals affirmed. *Id.* at 16a.

2. The court of appeals affirmed the order of deportation. Pet. App. 1a-15a. The court rejected petitioner's due process claim that the venue of his deportation hearing at a place distant from his residence prejudiced his right to counsel and to present witnesses. *Id.* at 6a-9a.[1] The court noted that the INS is statutorily authorized to determine where an alien will be detained, *id.* at 7a (citing 8 U.S.C. 1252(c)), and that petitioner never moved for a change of venue, Pet. App. 7a. The court concluded that "[t]he IJ did all that was necessary to safeguard [petitioner's] statutory right to counsel when the IJ advised him of that right, gave him a list of free and inexpensive legal services in the area, and postponed the hearing to allow him time to secure representation." *Id.* at 8a. Petitioner never claimed that he had any relationship with counsel elsewhere that was disrupted by the transfer, nor did he present any evidence that counsel was unavailable to him in Louisiana. *Ibid.* Petitioner also failed to show any practical prejudice to his right to present witnesses and evidence. *Id.* at 8a-9a. Thus, the court of appeals noted that petitioner "did in fact present evidence in the form of letters and documents," and that he "failed

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[1] In reviewing the due process claim, the court noted that petitioner may have waived any constitutional claims by failing to raise them before the Board of Immigration Appeals, but found it unnecessary to reach the waiver question because the claims themselves were "demonstrably without merit," not rising "even to the level of abuse of administrative or judicial discretion, not to say to the level of constitutional defects." Pet. App. 6a-7a.

to specify what additional evidence or witnesses he would have presented had the hearing taken place elsewhere, or why affidavits of those witnesses would have been insufficient." *Id.* at 9a.[2]

ARGUMENT

The petition for a writ of certiorari should be denied because the issue raised in the petition is fact-bound, and because the decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. Moreover, petitioner waived his constitutional claim by failing to raise it before the Board of Immigration Appeals.

The court of appeals correctly rejected petitioner's claim that the conduct of his deportation hearing at the INS detention facility in Oakdale, Louisiana, violated his right to procedural due process.[3] As the court noted, the immigration judge advised petitioner of his right to counsel, gave him a list of legal services providers, and granted him a continuance to afford him an opportunity to obtain representation. Pet. App. 8a. Only when petitioner stated, after one continuance, that he did not want additional time to

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[2] The court also rejected petitioner's due process claims that the IJ failed to act impartially in questioning him, that he should have been provided with a Spanish translator, and that he had to appear at the hearing in prisoner's clothing. Pet. App. 6a, 9a-10a. Petitioner does not pursue those claims in this Court. Pet. i.

[3] Petitioner also contends that the INS deprived him of his statutory right to counsel. Pet. 7-10. Not only is that claim without merit in view of the IJ's full compliance with the requirements of 8 U.S.C. 1362, but also the claim is not encompassed within the question presented in the petition, which focuses exclusively on petitioner's constitutional claim. See Pet. i.

seek counsel but would prefer to represent himself, did the IJ proceed with the deportation hearing. *Ibid.*

Petitioner now contends that "the fact that he made no attempt to present a defense at the hearing" demonstrates a lack of knowledge and voluntariness regarding his waiver of his statutory right to counsel. Pet. 9. We are unaware of any reported decision holding that a failure to present a defense establishes a lack of knowing waiver of a right to counsel. Even assuming that such a failure might in certain circumstances be probative of an alien's lack of understanding of the consequences of waiver, petitioner fails to raise any such inference here because he fails to identify any defense that he would have presented had he retained counsel. Indeed, petitioner pursued on his own behalf an application for relief under 8 U.S.C. 1182(c), presenting evidence of his family ties, employment history, property ownership, and efforts to rehabilitate himself through alcohol rehabilitation. Pet. App. 11a-12a, 18a-19a. And as the court of appeals noted, "the IJ confirmed several times that [petitioner] understood English." *Id.* at 10a. There is simply no basis in the record upon which to conclude that petitioner's waiver was not knowingly made.

The court of appeals also correctly rejected petitioner's contention that the location of the detention facility prevented him from presenting witnesses and evidence. Pet. App. 8a-9a. Petitioner did submit evidence, including "letters from family members, his employer, a member of a non-profit dance troupe to which he belonged, and a Georgetown law student regarding [his] participation in the D.C. Street Law program." *Id.* at 4a. Thus, petitioner was able to present, and the IJ took into account, the views of

persons who resided far from Oakdale. Petitioner "failed to specify what additional evidence or witnesses he would have presented had the hearing taken place elsewhere, or why affidavits of those witnesses would have been insufficient." *Id.* at 9a. The court correctly concluded that "[t]his lack of specificity is fatal to [petitioner's] claim," because the court "could not determine whether the place of hearing violated his right to present evidence and witnesses without any record indication of the nature of evidence otherwise available to him and its potential importance to his claim." *Ibid.* (citing *Maldonado-Perez* v. *INS*, 865 F.2d 328, 334-336 (D.C. Cir. 1989)). [4]

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[4] The Ninth Circuit in *Rios-Berrios* v. *INS*, 776 F.2d 859, 860-863 (1985), upon which petitioner relies, found a lack of waiver of the right to counsel of an alien who, unlike petitioner, had just arrived in this country, spoke only Spanish, was not advised at his deportation hearing of his right to counsel, and who nonetheless was in the process of securing counsel when the IJ commenced the deportation hearing without inquiring about the alien's expressed wish to be represented by counsel. Although the court in *Rios-Berrios* mentioned that the alien had been removed nearly 3000 miles from his only friend in this country, *id.* at 862-863, it took care to caution that "[w]e are not saying that the petitioner should not have been transported to Florida. That is within the province of the Attorney General to decide," *id.* at 863. Rather, the court concluded that the IJ "should have continued the hearing so as to provide the petitioner a reasonable time to locate counsel," *ibid.*, which is precisely what the IJ did here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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